

Exhibit C

Part 1 of 3

1 Mark D. Kemple (State Bar No. 145219)
2 Erik K. Swanholt (State Bar No. 198042)
3 JONES DAY
4 555 South Flower Street
5 Fiftieth Floor
6 Los Angeles, CA 90071-2300
7 Telephone: (213) 489-3939
8 Facsimile: (213) 243-2539
9 Email: mkemple@jonesday.com
10 Email: ekswanholt@jonesday.com

11 Attorneys for Defendants
12 Greystone Servicing Corporation, Inc., and
13 Greystone CDE, LLC

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **(SAN FRANCISCO DIVISION)**

17 SANTA FE POINTE, LP, an Oklahoma
18 limited partnership; SANTA FE
19 MANAGEMENT, LLC, an Oklahoma
20 limited liability company; RANT, LLC, a
21 Delaware limited liability company; and
22 THEOTIS F. OLIPHANT, an individual,

23 Plaintiffs,

24 v.

25 GREYSTONE SERVICING
26 CORPORATION, INC., a Georgia
27 corporation; GREYSTONE CDE, LLC, a
28 Delaware limited liability company, and
DOES 1 through 100, inclusive,

Defendants.

CASE NO. C 07-05454 JCS

Assigned for all purposes to the
Honorable Joseph C. Spero

**NOTICE OF MOTION AND
MOTION TO TRANSFER VENUE;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF;
STATEMENT IN SUPPORT OF
NOTICE OF PENDENCY OF
OTHER ACTION OR
PROCEEDING (CIVIL L.R. 3-13);
AND DECLARATIONS OF
MATTHEW JAMES AND ERIK K.
SWANHOLT**

[[Proposed] Order filed concurrently
herewith]

Date: December 14, 2007
Time: 9:30 a.m.
Ctrm: A (15th Floor)

NOTICE OF MOTION AND MOTION**TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that Defendants Greystone Servicing Corporation, Inc. and Greystone CDE, LLC (collectively, "Defendants" or "Greystone") will, and hereby do, move the Court for an order transferring venue of this case to the United States District Court for the Southern District of New York, Foley Square Division. The motion will come before the Court on December 14, 2007 at 9:30 a.m., or on a date and at a time to be designated by the Court as its calendar requires, or as soon thereafter as the parties may be heard in Courtroom A (15th Floor) of the above-entitled Court located at 450 Golden Gate Avenue, San Francisco, California 94102.

The motion is made pursuant to 28 U.S.C. § 1404(a) on the grounds that the interests of justice, judicial economy, and the convenience of the parties and witnesses will be promoted by a transfer. The motion is based upon: this Notice; the attached Memorandum of Points and Authorities, which shall also serve as Defendants' Statement in Support of the Notice of Pendency of Other Action or Proceeding filed pursuant to Civil L.R. 3-13; the attached First Amended Complaint from a related action pending before the Southern District of New York; the declarations of Matthew James and Erik K. Swanholt; such matters which the Court may consider by way of judicial notice; the pleadings and the records on file herein; and such further written and oral evidence and argument as may be presented at the time of the hearing.

DATED: November 7, 2007

JONES DAY

By: 

Mark D. Kemple
Erik K. Swanholt

Attorneys for Defendants Greystone
Servicing Corporation, Inc. and Greystone
CDE, LLC

TABLE OF CONTENTS

		Page
1		
2		
3	I. STATEMENT OF THE ISSUE.....	1
4	II. INTRODUCTION	1
5	III. BACKGROUND FACTS.....	2
6	IV. ARGUMENT	4
7	A. Venue Is Proper In The Southern District Of New York.....	4
8	B. Transfer Will Serve The Convenience Of The Parties And	
9	Witnesses, And Will Promote The Interests Of Justice	5
10	1. New York is a Proper Forum Pursuant to the Forum	
11	Selection Clause in the Parties' Agreements	6
12	2. New York Courts Are Most Familiar With New York	
13	Law.....	7
14	3. Transfer and Consolidation of This Action With	
15	Greystone's New York Action Will Promote Judicial	
16	Efficiency and Reduce the Costs of Litigation for the	
17	Parties	8
18	4. Most Party and Third-Party Witnesses Reside in New	
19	York or Are Nearer to New York Than California.....	9
20	5. Sources of Proof are Located in or Near New York.....	11
21	6. Plaintiff's Choice of Forum Should Receive Minimal	
22	Consideration, Because California is not the Locus of the	
23	Operative Facts and has No Interest in the Subject Matter.....	12
24	C. Under The Doctrine Of Federal Comity, Judicial Efficiency	
25	Would Be Best Served By Declining Jurisdiction Over	
26	Plaintiffs' Anticipatory Suit	13
27	V. CONCLUSION.....	14
28		

TABLE OF AUTHORITIES

Page

Cases

1		
2		
3	<u>Cases</u>	
4	<i>Angotti v. Rexam, Inc.</i> ,	
5	2006 U.S. Dist. LEXIS 15488 at *12-13 (N.D. Cal. Feb. 14, 2006)	7, 9
6	<i>Barapind v. Reno</i> ,	
7	225 F.3d 1100 (9th Cir. 2000)	13
8	<i>Church of Scientology v. United States Dep't of Army</i> ,	
9	611 F.2d 738 (9th Cir. 1979)	13, 14
10	<i>Coxcom, Inc. v. Hybrid Patents, Inc.</i> ,	
11	2007 U.S. Dist. LEXIS 67168 at *7 (N.D. Cal. Aug. 30, 2007)	11
12	<i>Decker Coal Co. v. Commonwealth Edison Co.</i> ,	
13	805 F.2d 834 (9th Cir. 1986)	5
14	<i>Fabus Corp. v. Asiana Express Corp.</i> ,	
15	2001 U.S. Dist. LEXIS 2568 at *6 (N.D. Cal. Mar. 5, 2001)	13
16	<i>Gates Learjet Corp. v. Jensen</i> ,	
17	743 F.2d 1325 (9th Cir. 1984)	10
18	<i>Gelber v. Leonard Wood Mem'l for the Eradication of Leprosy & the Am. Leprosy</i>	
19	<i>Found.</i> ,	
20	2007 U.S. Dist. LEXIS 47535 at *14-15 (N.D. Cal. June 21, 2007)	8
21	<i>Greenwell v. Belkin Corp.</i> ,	
22	2006 U.S. Dist. LEXIS 76231 at *4 (N.D. Cal. Oct. 10, 2006)	4
23	<i>Gulf Oil Corp. v. Gilbert</i> ,	
24	330 U.S. 501 (1947)	8
25	<i>Hoffman v. Blaski</i> ,	
26	363 U.S. 335 (1960)	4
27	<i>Jacobson v. Hughes Aircraft Co.</i> ,	
28	105 F.3d 1288 (9th Cir. 1997) <i>rev'd</i> , 525 U.S. 432, 119 S.Ct. 755, 142 L.Ed.2d	
	881 (emphasis added)	12
	<i>Jones v. GNC Franchising, Inc.</i> ,	
	211 F.3d 495 (9th Cir. 2000)	4, 5, 6
	<i>Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.</i> ,	
	342 U.S. 180 (1950)	13, 14
	<i>Lou v. Belzberg</i> ,	
	834 F.2d 730 (9th Cir. 1987)	8
	<i>Lupiani v. Wal-Mart Stores, Inc.</i> ,	
	2003 U.S. Dist. LEXIS 18804 at *14 (N.D. Cal. Oct. 17, 2003)	12, 13
	<i>Manetti-Farrow, Inc. v. Gucci Am., Inc.</i> ,	
	858 F.2d 509 (9th Cir. 1988)	6, 7
	<i>Pacesetter Systems, Inc. v. Medtronic, Inc.</i> ,	
	678 F.2d 93 (9th Cir. 1982)	13
	<i>Pall Corp. v. Bentley Labs, Inc.</i> ,	
	523 F. Supp. 450 (D. Del. 1981)	9

TABLE OF AUTHORITIES
(continued)

		Page
3	<i>Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.</i> , 741 F.2d 273 (9th Cir. 1984).....	6
4	<i>Ricoh Co. Ltd. v. Honeywell, Inc.</i> , 817 F. Supp. 473 (D. N.J. 1993).....	9
5	<i>Saleh v. Titan Corp.</i> , 361 F. Supp. 2d 1152 (S.D. Cal. 2005)	5, 10, 11
6	<i>Spradlin v. Lear Siegler Mgmt. Servs. Co.</i> , 926 F.2d 865 (9th Cir. 1991).....	6
7	<i>Stewart Org., Inc. v. Ricoh Corp.</i> , 487 U.S. 22 (1988)	4, 5
8	<i>The Bremen v. Zapata Off-Shore Co.</i> , 407 U.S. 1 (1972).....	6
9	<i>Unisys Corp. v. Access Co., Ltd.</i> , 2005 U.S. Dist. LEXIS 31897 at *13 (N.D. Cal. Nov. 23, 2005).....	7
10	<i>Van Dusen v. Barrack</i> , 376 U.S. 612 (1964)	4
11	<i>Zeta-Jones v. Spice House</i> , 372 F. Supp. 2d 568 (C.D. Cal. 2005).....	12
12	<u>Statutes</u>	
13	28 U.S.C. § 1332	5
14	28 U.S.C. § 1404(a).....	passim
15	<u>Other Authorities</u>	
16	Gibbs & Oliphant LLP, <i>Attorney Profile: Theo T. Oliphant, at</i> http://www.gotolawfirm.com/theo_oliphant.php	7

1 **I. STATEMENT OF THE ISSUE**

2 Whether pursuant to the parties' agreements, for the convenience of parties and
3 witnesses, and/or in the interest of justice the matter should be transferred to the Southern
4 District of New York?

5 **II. INTRODUCTION**

6 Each Plaintiff in this action "irrevocably and unconditionally" agreed that if a
7 dispute should arise between the parties pursuant to certain agreements the Plaintiffs would
8 (1) submit to personal jurisdiction in New York, (2) waive any objection to the laying of
9 venue there, and (3) have the agreements upon which this action is based governed by New
10 York law. Each of the agreements at issue in this action has a provision that reads, in
11 substantial part:

12 (a) Pledgors hereby irrevocably and unconditionally:

13 (i) Submit themselves . . . in any legal action or proceeding
14 relating to this agreement . . . to the non-exclusive general
15 jurisdiction of the Courts of the State of New York, the Courts
of the United States of America for the State of New York,
and the appellate courts from any thereof[.]

16 (ii) consent that any such action . . . may be brought in such
17 courts, and waive[] any objection . . . to the venue of any such
action or proceeding in any such court

18 (Emphasis added.)

19 A dispute has arisen under those agreements. Pursuant to those agreements,
20 Greystone (defendant in this action) brought suit against the same Santa Fe entities who are
21 plaintiffs in this action, as well as Mr. Oliphant, in the Southern District of New York.¹
22 Despite the agreements and the forum selection and waiver clauses they contain, the Santa
23 Fe entities and Mr. Oliphant brought their nearly identical action against Greystone in
24 Alameda Superior Court. Defendants removed that action to this Court and now seek an
25 order transferring this action to its proper venue in New York where it can be heard with
26 the New York Action.

27 ¹ Declaration of Erik K. Swanholt ("Swanholt Decl."), ¶ 2, Ex. 3 (Greystone CDE, LLC, v.
28 Santa Fe Pointe, L.P., Santa Fe Pointe Management, LLC, RANT, LLC and Theotis F. Oliphant,
U.S.D.C. S.D.N.Y. Case No. 07 Civ. 8377 (RPP)).

1 The New York Action will proceed regardless of whether this motion is granted or
2 not. Plaintiffs cannot successfully move to have that matter transferred here as they have
3 contractually agreed not to challenge jurisdiction and venue in New York. Thus, even
4 without resort to the elements of § 1404(a) regarding Greystone's motion to transfer, it is
5 axiomatic that this matter belongs in the Southern District of New York. All witnesses and
6 parties necessarily will need to travel to New York in all events. Further, New York is the
7 only venue in which these nearly identical and interrelated disputes can be resolved at once.

8 Any result other than a transfer of this action to the Southern District of New York
9 would require this Court to duplicate the efforts of the New York court in interpreting the
10 same agreements, applying the same applicable New York law and presiding over the
11 examination of the same witnesses. Further, both party and non-party witnesses expected
12 to be called in both actions, of which there are many, would be unduly burdened by the
13 duplicative demands on their time for travel and testimony should these matters proceed in
14 courts on opposite coasts.

15 Analysis and application of the standard 1404(a) elements applicable to this motion
16 also favors transfer to New York. First, the agreements at issue call for the application of
17 New York law to all disputes relating to those agreements. Second, as explained below, the
18 bulk of the material witnesses to this action are located in New York, or are much nearer to
19 New York than to California. By contrast, Plaintiffs filed their action in a forum that bears
20 no relation to the operative facts or governing law, and that is contrary to the parties'
21 agreement to pursue litigation relating to the agreements in New York. Accordingly,
22 pursuant to the parties' agreements, the interest of judicial efficiency, and for the
23 convenience of the witnesses and parties, Defendants respectfully seek an order transferring
24 this action to the Southern District of New York.

25 **III. BACKGROUND FACTS**

26 This matter arises out of Plaintiff Theotis F. Oliphant's ("Oliphant") failed pursuit of
27 the development of a multi-million dollar Low Income Housing Tax Credit project (the
28 "Santa Fe project") located in Oklahoma City, for which Plaintiffs obtained \$500,000 in

1 bridge financing from Greystone.

2 Greystone was engaged by Plaintiffs to assist in obtaining financing through various
3 government entities, including the U.S. Department of Housing and Urban Development
4 ("HUD"), for the Santa Fe project. [Declaration of Matthew James ("James Decl."), ¶¶ 3,
5 4.] On or about December 20, 2006, Plaintiffs borrowed \$500,000 in bridge financing from
6 Greystone to pay for the issuance of the bonds required to finance the project (the "Bridge
7 Loan"). [James Decl., ¶ 11.] Plaintiffs and Greystone entered into certain Bridge Loan
8 agreements which were signed by Oliphant in his individual capacity as well as in his
9 representative capacity on behalf of his Santa Fe project-related entities (the "Bridge Loan
10 documents").² The Bridge Loan documents contain choice-of-law and forum selection
11 provisions selecting New York as the governing law and forum for actions relating to the
12 Bridge Loan documents. [*Id.*] Thus, in executing those agreements, every Plaintiff in this
13 action submitted to personal jurisdiction in New York and expressly waived any objection
14 to the laying of venue there. [*See, e.g.,* Swanholt Decl., ¶ 6, Ex. 3D at 15-16 (Sec. 26).]

15 After closing the Bridge Loans, it soon became clear that Plaintiffs would not be
16 able to perform their obligations under their agreements with Greystone. On August 21,
17 2007, Greystone sent Plaintiffs a Notice of Default letter. [Swanholt Decl., ¶¶ 11, 12, Exs.
18 3I & 3J]; [James Decl., ¶¶ 14, 15, Exs. 1, 2.]

19 In response, and anticipation of litigation concerning their inability to perform the
20 Bridge Loan documents, on September 7, 2007 Plaintiffs filed an action in the Superior
21 Court of California for the County of Alameda in plain contravention of the forum selection
22 clause in each of the agreements. *See* Notice of Removal (doc. # 1), Ex. A1³. Plaintiff
23 served their First Amended Complaint (they never served their original complaint) on
24 Greystone's registered agent for service of process on September 25, 2007. *See id.*, Ex. A2.

25 ² Swanholt Decl., ¶¶ 3-9, Exs. 3A-3G. The FAC filed with the court in the New York
26 Action had appended as exhibits all of the exhibits used in this motion (except for Exhibits 4-6).
27 Thus, for the convenience of the Court and for consistency of reference, the moving parties have
retained the exhibit structure of the FAC. Thus, while Exhibit 3 is the FAC, Exhibit 3A is the same
as exhibit A to the FAC, 3B is exhibit B to the FAC, etc.

28 ³ Defendants hereby request the Court to take judicial notice of Defendants' Notice of
Removal filed in this matter on October 25, 2007 and identified as item #1 on the Court's docket.

1 Greystone first learned of the existence of Plaintiffs' action on September 27, 2007.
2 [Swanholt Decl., ¶ 13, Ex. 4.] On September 26, 2007, pursuant to the parties' agreements
3 and unaware of Plaintiffs' filing of this action, Greystone filed its action against Oliphant
4 and the Santa Fe entities relating to the Bridge Loan documents in the Southern District of
5 New York, where the matter is now pending before Judge Patterson. [Swanholt Decl., ¶¶ 2,
6 14, Exs. 3, 5.]

7 **IV. ARGUMENT**

8 "For the convenience of parties and witnesses, in the interest of justice, a district
9 court may transfer any civil action to any other district or division where it might have been
10 brought." 28 U.S.C. § 1404(a). The purpose of § 1404(a) "is to prevent the waste of time,
11 energy and money 'and to protect litigants, witnesses and the public against unnecessary
12 inconvenience and expense . . .'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). A
13 motion for transfer lies within the broad discretion of the District Court and must be
14 determined on an individualized basis. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498
15 (9th Cir. 2000) (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)).

16 Transfer is appropriate where the moving party establishes that venue is proper in
17 the transferee District, and that the transfer will serve the convenience of the parties and
18 witnesses and will promote the interests of justice. *See Greenwell v. Belkin Corp.*, 2006
19 U.S. Dist. LEXIS 76231 at *4 (N.D. Cal. Oct. 10, 2006) (citing *Hoffman v. Blaski*, 363 U.S.
20 335, 343-44 (1960)).

21 **A. Venue Is Proper In The Southern District Of New York.**

22 To prevail on their motion to transfer pursuant to § 1404(a), Defendants must first
23 show that (1) the Southern District of New York has subject matter jurisdiction, (2) venue
24 is proper in the Southern District of New York, and (3) the Southern District of New York
25 can exercise personal jurisdiction over defendants. 28 U.S.C. § 1404(a). All of these
26 prerequisite conditions are satisfied.

27 Here, the Southern District of New York is a proper venue and the District Court
28 would have both personal jurisdiction over the Plaintiffs because (1) Defendants maintain

1 offices and conduct business in New York; and (2) the same underlying contracts at issue in
2 this action and the New York Action contain valid forum selection clauses by which each
3 of the Plaintiffs submitted to personal jurisdiction in New York, and expressly waived any
4 objection to the laying of venue there.

5 Moreover, the Southern District of New York also has subject matter jurisdiction on
6 the same basis as this Court, because there is complete diversity between the parties and the
7 jurisdictional amount in controversy is met. *See* 28 U.S.C. § 1332; Notice of Removal.
8 (doc. # 1) ¶¶ 3-18. As such, this case could have been brought in the Southern District of
9 New York.

10 **B. Transfer Will Serve The Convenience Of The Parties And Witnesses,**
11 **And Will Promote The Interests Of Justice.**

12 A District Court has broad discretion to grant a motion for transfer of venue, and the
13 decision whether to transfer is to be made based on “an individualized, case-by-case
14 consideration of convenience and fairness.” *Jones*, 211 F.3d at 498 (quoting *Stewart Org.,*
15 *Inc.*, 487 U.S. at 29). In evaluating a § 1404(a) transfer motion, the District Court may
16 consider a multitude of factors.⁴ *See Jones*, 211 F.3d at 498.

17 In this case, the pertinent factors are: (1) the existence of a valid forum selection
18 clause; (2) the transferee forum’s familiarity with the governing law; (3) the promotion of
19 judicial efficiency and reduction in the costs of litigation; (4) the convenience of the
20 witnesses and parties; (5) the location of sources of proof; and (6) the lack of a connection
21 between Plaintiffs’ causes of action and chosen forum.

22
23 ⁴ A comprehensive list of potentially relevant factors considered to varying degrees in
24 different cases includes: (1) the presence of a forum selection clause; (2) the state that is most
25 familiar with the governing law; (3) the location where the relevant agreements were negotiated
26 and executed; (4) the extent to which there is a connection between the plaintiff’s causes of action
27 and the forum; (5) the convenience of the witnesses; (6) the availability of compulsory process to
28 compel attendance of unwilling non-party witnesses; (7) the existence of administrative difficulties
resulting from court congestion; (8) the ease of access to sources of proof; (9) the differences in the
costs of litigation in the two forums; (10) whether there is a “local interest in having localized
controversies decided at home”; (11) whether unnecessary problems in conflict of laws, or in the
application of foreign law, can be avoided; and (12) the plaintiff’s choice of forum. *See, e.g.,*
Jones, Inc., 211 F.3d at 498-99; *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843
(9th Cir. 1986); *Saleh*, 361 F. Supp. 2d at 1156.

1 **1. New York is a Proper Forum Pursuant to the Forum Selection**
2 **Clause in the Parties' Agreements.**

3 The existence of a forum selection clause is a "significant factor in the court's §
4 1404(a) analysis." *Jones*, 211 F.3d at 498-99. The fact that Plaintiffs' "irrevocably and
5 unconditionally" agreed to venue in New York throughout the parties' contracts weighs
6 considerably in favor of transfer to the Southern District of New York. *See supra*, at 1 n.1.

7 In cases based on diversity jurisdiction, "federal law . . . applies to [the]
8 interpretation of forum selection clauses." *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858
9 F.2d 509, 513 (9th Cir. 1988). Forum selection clauses are presumptively valid and will
10 not be set aside absent a showing that "enforcement would be unreasonable and unjust, or
11 that the clause was invalid for such reasons as fraud or overreaching." *Manetti-Farrow,*
12 *Inc.*, 858 F.2d at 512 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).⁵
13 Consequently, the party resisting enforcement of a forum selection clause has a "heavy
14 burden" to establish the unreasonableness of the clause. *Pelleport*, 741 F.2d at 281 (citing
15 *The Bremen*, 407 U.S. at 18). The opposing party must "show that trial in the contractual
16 forum would be so gravely difficult and inconvenient that he will for all practical purposes
17 be deprived of his day in court." *See The Bremen*, 407 U.S. at 18; *Pelleport*, 741 F.2d at
18 280 (9th Cir. 1984) ("Absent some evidence submitted by the party opposing enforcement
19 of the clause to establish fraud, undue influence, overweening bargaining power, or such
20 serious inconvenience in litigating in the selected forum so as to deprive that party of a
21 meaningful day in court, the provision should be respected as the expressed intent of the
22 parties.").

23 Plaintiffs are sophisticated parties who were assisted by the law firm of Gibbs &
24 Oliphant LLP in executing the Bridge Loan documents. Indeed, Plaintiff Oliphant, a
25 former partner with a large international law firm, holds himself out as possessing

26
27 ⁵ Although *The Bremen* involved an international forum selection clause in a commercial
28 contract, the Ninth Circuit has approved *The Bremen* framework for domestic forum selection
clauses. *See Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 867-68 (9th Cir. 1991);
Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 279 (9th Cir. 1984).

1 experience in a “sophisticated corporate and private equity practice.” [Swanholt Decl.,
2 ¶ 15, Ex. 6. (See Gibbs & Oliphant LLP, *Attorney Profile: Theo T. Oliphant*, at
3 http://www.gotolawfirm.com/theo_oliphant.php.)] The bargaining power was equal.

4 The forum selection clauses clearly reflect that the parties contemplated adjudicating
5 matters relating to their agreements in a New York forum. Moreover, the forum selection
6 clauses at issue here cover all of Plaintiffs’ claims, including those sounding in tort,
7 because all claims relate to the underlying agreements. See *Manetti-Farrow, Inc.*, 858 F.2d
8 at 514.⁶

9 Plaintiffs may argue that the forum selection clauses are permissive and thus should
10 receive less weight. As one Court in this District stated, however, Plaintiffs’ likely
11 argument is not compelling:

12 [A]lthough the forum selection clause is permissive, the fact
13 that the parties contemplated [the proposed forum for transfer]
14 as a possible forum is entitled to “substantial consideration” in
15 this analysis. Further, “[w]hile courts normally defer to a
16 plaintiff’s choice of forum, such deference is inappropriate
where the plaintiff has already freely contractually chosen an
appropriate venue. . . . [Thus,] the plaintiffs bear the burden of
demonstrating why they should not be bound by their
contractual choice of forum.

17 *Unisys Corp. v. Access Co., Ltd.*, 2005 U.S. Dist. LEXIS 31897 at *13 (N.D. Cal. Nov. 23,
18 2005) (internal citations omitted) (emphasis added); see also *Angotti v. Rexam, Inc.*, 2006
19 U.S. Dist. LEXIS 15488 at *12-13 (N.D. Cal. Feb. 14, 2006).

20 2. New York Courts Are Most Familiar With New York Law.

21 Each of the Plaintiffs also agreed that the Bridge Loan documents “shall be
22 governed by and construed in accordance with the laws of the State of New York.”⁷

23 Although this Court is certainly competent to apply the state laws of New York in this
24 matter, the Southern District of New York is more familiar with the relevant New York

25 ⁶ Indeed, Plaintiffs’ tort claims relate to the contracts because, among other reasons, they
26 are all subject to dismissal on account of the exculpatory clauses by which Plaintiffs released
Greystone from such liability. [See, e.g., Swanholt Decl., ¶ 2, Ex. 3A at 18 (§ 10.6 of Bridge Loan
Agreement).]

27 ⁷ [Swanholt Decl., ¶¶ 3, 5-7 (Ex. 3A at 18 (agreed by Plaintiff Santa Fe Pointe, LP); Ex. 3C
28 at 11 (agreed by Plaintiff Oliphant); Ex. 3D at 13 (agreed by Plaintiff Santa Fe Pointe
Management, LLC); Ex. 3E at 12 (agreed by Plaintiff RANT, LLC)).]

1 state laws governing these claims. *See Gelber v. Leonard Wood Mem'l for the Eradication*
2 *of Leprosy & the Am. Leprosy Found.*, 2007 U.S. Dist. LEXIS 47535 at *14-15 (N.D. Cal.
3 June 21, 2007) (finding, in the case of a mixed complaint raising both state and federal
4 claims, familiarity of district court in South Carolina with South Carolina law, as selected
5 in the parties' contractual choice-of-law provision, weighed in favor of transfer to the
6 District of South Carolina). The familiarity of the Southern District of New York with the
7 governing law of this case also favors the transfer of this matter to that District.

8 **3. Transfer and Consolidation of This Action With Greystone's New**
9 **York Action Will Promote Judicial Efficiency and Reduce the**
Costs of Litigation for the Parties.

10 In this case, the public and private interests strongly favor transfer to the Southern
11 District of New York because Plaintiffs are already required to appear as defendants in the
12 New York Action. Plaintiffs cannot challenge venue in the Southern District of New York,
13 having waived such defenses by agreeing to the forum selection and venue clauses
14 discussed above. Thus, the only way all claims between these parties relating to the Santa
15 Fe project can be litigated in one forum is if they are litigated in the Southern District of
16 New York. The parties' litigation costs will either stay the same, or, more likely, be
17 reduced by a transfer allowing consolidation of the related cases in the Southern District of
18 New York. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (affirming district
19 court's decision to transfer case to the Southern District of New York when the costs of
20 litigation would be reduced by having the case heard there).

21 Importantly, a transfer allowing these cases to be heard together by the Southern
22 District of New York will promote the public interest. Relevant factors of public interest
23 include the avoidance of the potential for inconsistent judgments and the promotion of
24 judicial economy. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Greystone's
25 contract claims in the New York Action will require the court there to determine the
26 parties' rights and liabilities under the Bridge Loan documents. As discussed above, all of
27 Plaintiffs' tort and contract claims in this action also relate to the same agreements, and
28 must be resolved pursuant to New York law. Thus, the court in the New York Action has

1 before it all of the legal and factual issues raised by Plaintiffs' First Amended Complaint in
2 this case, and is familiar with the governing law of both actions.

3 Requiring this Court to duplicate the New York court's efforts would be an
4 unnecessary expenditure of judicial resources, and would create the risk of inconsistent
5 results—the very dangers § 1404(a) was designed to avoid. *See Angotti*, 2006 U.S. Dist.
6 LEXIS 15488 at *12-13 (finding that the transfer of claims “would avoid a risk of
7 inconsistent rulings, based on the law of two different circuits”). Where a related lawsuit
8 exists, “it is in the interest of justice to permit suits involving the same parties and issues to
9 proceed before one court and not simultaneously before two tribunals.” *Pall Corp. v.*
10 *Bentley Labs, Inc.*, 523 F. Supp. 450, 453 (D. Del. 1981). As one District has explained:

11 Transfer in such a circumstance has numerous benefits. Cases
12 can be consolidated before one judge thereby promoting
13 judicial efficiency; pretrial discovery can be conducted in a
14 more orderly manner; witnesses can be saved the time and
15 expense of appearing at trial in more than one court; and
duplicative litigation involving the filing of records in both
courts is avoided, thereby eliminating unnecessary expense
and the possibility of inconsistent results.

16 *Ricoh Co. Ltd. v. Honeywell, Inc.*, 817 F. Supp. 473, 487 (D. N.J. 1993) (citations omitted).

17 In this action, the Southern District of New York is the superior forum. The New
18 York Action involves the same agreements at issue here; those agreements are governed by
19 New York law; the parties have agreed to forum in New York; and Plaintiffs must appear
20 in the Southern District of New York to defend against Greystone's contract claims, having
21 waived all objections to jurisdiction and venue there. In sum, transfer of this action to the
22 Southern District of New York will result in considerable gains in judicial efficiency, and
23 will likely reduce the costs of litigation for the parties.

24 **4. Most Party and Third-Party Witnesses Reside in New York or**
25 **Are Nearer to New York Than California.**

26 In deciding whether the relative convenience of the witnesses weighs in favor of
27 transfer, “the court must consider not simply how many witnesses each side has and the
28 location of each, but, rather, the court must consider the importance of the witnesses.”

1 *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1160-61 (S.D. Cal. 2005) (citing *Gates Learjet*
2 *Corp. v. Jensen*, 743 F.2d 1325, 1335-36 (9th Cir. 1984)).

3 Defendants' witness with the greatest knowledge of the Santa Fe project, Matthew
4 James, is located in New York and New Jersey, while most of the key party and third-party
5 witnesses are also located much nearer to New York than California. [James Decl., ¶ 2.]
6 Most of the services under the agreements were performed in or directed from New York,
7 Virginia, and Florida, and most of the persons who performed services under the
8 agreements, and who have personal knowledge of their negotiation and performance, are in
9 or near New York:

- 10 • Matthew James of Greystone & Co., Inc., Plaintiffs' primary contact at
11 Greystone for much of the transactions underlying this and the New York
12 Action, is located in New York, New York. [James Decl., ¶ 2.]
- 13 • Betsy Vartanian, Executive Vice President of Greystone Servicing Corporation,
14 Inc., was Greystone's most senior liaison to HUD on behalf of the Santa Fe
15 project. Ms. Vartanian is located in Warrenton, Virginia. [James Decl., ¶ 7.]
- 16 • Thom Ruffin, a Senior Vice President of Greystone Servicing Corporation, Inc.,
17 became involved in mid-August of 2007 to oversee possibilities of a "workout"
18 with Plaintiffs. Mr. Ruffin is located in Warrenton, Virginia. [James Decl.,
19 ¶ 13.]
- 20 • Miriam Simon, Greystone's senior underwriter for the Santa Fe project, is
21 located in Wisconsin. [James Decl., ¶ 8.]
- 22 • Pharrhah Jackson, Greystone's underwriter for Plaintiffs' application for the
23 Bridge Loan, is located in Tampa, Florida. [James Decl., ¶ 12.]
- 24 • Jeff Englund and Marilyn Willems are Greystone underwriters who evaluated
25 Oliphant's lack of qualifications for Fannie Mae financing for the Santa Fe
26 project. They are located in Tampa, Florida and Bethesda, Maryland
27 respectively. [James Decl., ¶ 6.]

28 These witnesses have personal knowledge of material events relating to the

1 execution, and Plaintiffs default, of the Bridge Loan documents, and will testify thereto.
2 The convenience of these witnesses favors venue in the Southern District of New York.
3 The convenience of the non-party witnesses also favors transfer:

- 4 • David Henry, Plaintiffs' purported property developer, is located in Arkansas.
5 [James Decl., ¶ 9.]
- 6 • Andre Blakely, Plaintiffs' advisor from National Equity Fund, is located in
7 Chicago, Illinois. [James Decl., ¶ 3.]

8 In sum, New York is a more convenient forum for the witnesses, since the majority
9 of witnesses, including the corporate executives responsible for Greystone's negotiations
10 and execution of the contracts, and the persons who performed services under the
11 agreements and possess personal knowledge of the agreements and the facts herein, reside
12 in or near New York.

13 Finally, it is anticipated that most if not all of the non-party witnesses expected to be
14 called in this action will also be called to testify in the New York Action. Absent a transfer
15 of this action to the Southern District of New York, the party and non-party witnesses will
16 be unduly burdened by the duplicative demands on their time for travel and testimony
17 imposed by Plaintiffs' unreasonable efforts to maintain suit in their home forum. *Coxcom,*
18 *Inc. v. Hybrid Patents, Inc.*, 2007 U.S. Dist. LEXIS 67168 at *7 (N.D. Cal. Aug. 30, 2007)
19 (finding that transfer of action to the Eastern District of Texas where a related matter was
20 pending would be more convenient for non-party witnesses located on California, because
21 it would eliminate the need to engage in duplicative litigation and travel). Therefore, the
22 convenience of the party and non-party witnesses weighs in favor of transferring this action
23 to the Southern District of New York.

24 **5. Sources of Proof are Located in or Near New York.**

25 "[T]he issue is the ease of access to the sources of proof, not whether the evidence
26 would be unavailable absent the transfer." *Saleh*, 361 F. Supp. 2d at 1166 (citation
27 omitted). Documents and other physical evidence relating to Plaintiffs' claims are in New
28 York, Virginia, Florida and Oklahoma, where Greystone, HUD and OHFA officials

involved throughout the project can be found. [James Decl., ¶ 10.] Sources of proof of the events giving rise to Plaintiffs' claims are much more likely to be located in those places than in California. Furthermore, most sources of proof associated with the witnesses will also be found where those witnesses are located. As explained above, most of the witnesses can be found in New York, or nearer to New York than California.

6. Plaintiff's Choice of Forum Should Receive Minimal Consideration, Because California is not the Locus of the Operative Facts and has No Interest in the Subject Matter.

As the Ninth Circuit has made evident, plaintiff's choice is merely "*one of several factors* a court must consider when ruling on a motion to transfer venue." *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1302 (9th Cir. 1997) *rev'd*, 525 U.S. 432, 119 S.Ct. 755, 142 L.Ed.2d 881 (emphasis added); *see also Zeta-Jones v. Spice House*, 372 F. Supp. 2d 568, 575 (C.D. Cal. 2005) (acknowledging that "deference should be accorded to plaintiffs' choice of forum" but still transferring the action from the Central District of California to the District of Nevada because "considerations of relative convenience to the parties and likely witnesses, availability of compulsory process, and ease of access to sources of proof" militated in favor of a transfer to Nevada); *Lupiani v. Wal-Mart Stores, Inc.*, 2003 U.S. Dist. LEXIS 18804 at *14 (N.D. Cal. Oct. 17, 2003) (granting defendant's motion to transfer venue because other than plaintiff's choice of forum, the other factors weighed in favor of transfer).

Here, Plaintiffs have already contractually agreed to venue any action relating to the Bridge Loan documents and Santa Fe project in New York. Further, to the extent any such right is found to exist, Plaintiffs' choice of forum should be given little weight because the aforementioned factors—including the forum selection clauses, the applicability of New York law, the differences in the costs of litigation, the promotion of judicial efficiency, the convenience of the witnesses and the ease of access to sources of proof—all compel transfer to the Southern District of New York. Moreover, while it is relevant that Plaintiff Oliphant resides in California, the mere fact that Plaintiffs' or their counsel is located there should not factor into the analysis. "Courts have consistently held that the convenience of

1 plaintiff's counsel is not a factor to be considered in determining whether a particular locale
2 is a convenient forum." *Lupiani*, 2003 U.S. Dist. LEXIS 18804 at *10 (citing *Fabus Corp.*
3 *v. Asiana Express Corp.*, 2001 U.S. Dist. LEXIS 2568 at *6 (N.D. Cal. Mar. 5, 2001)).
4 Finally, California has no interest in the subject matter of this dispute because, as Plaintiffs
5 allege, this matter arises out of Oliphant's pursuit of a real estate development opportunity
6 in Oklahoma, and the Santa Fe entities were created for only that purpose. [James Decl.,
7 ¶ 5.]

8 **C. Under The Doctrine Of Federal Comity, Judicial Efficiency Would Be**
9 **Best Served By Declining Jurisdiction Over Plaintiffs' Anticipatory Suit.**

10 "There is a generally recognized doctrine of federal comity which permits a district
11 court to decline jurisdiction over an action when a complaint involving the same parties and
12 issues has already been filed in another district." *Pacesetter Systems, Inc. v. Medtronic,*
13 *Inc.*, 678 F.2d 93, 94-5 (9th Cir 1982). It is a discretionary doctrine intended to promote
14 judicial efficiency, and, as such, decisions applying the doctrine are subject to review only
15 for abuse of discretion. *See Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000).

16 The federal comity doctrine has sometimes been referred to by the courts and
17 practitioners as the "first-to-file" rule—a locution that describes the "classic formulation"
18 where deference is traditionally given to the court presiding over the first-filed action
19 unless there is a showing of bad faith, anticipatory suit, or a balance of conveniences
20 favoring the forum of the second-filed action. *See Church of Scientology v. United States*
21 *Dep't of Army*, 611 F.2d 738, 750 (9th Cir. 1979). The cases also demonstrate that not all
22 cases fit the mold of the "classic formulation." As the Supreme Court has observed of the
23 problems inherent to concurrent jurisdiction, "[w]ise judicial administration, giving regard
24 to conservation of judicial resources and comprehensive disposition of litigation, does not
25 counsel rigid mechanical solution of such problems." *Kerotest Mfg. Co. v. C-O-Two Fire*
26 *Equip. Co.*, 342 U.S. 180, 183 (1950). In sum, federal comity and the "first-to-file" rule
27 remain flexible doctrines subject to the broad discretion of the District Court.

28 In view of circumstances indicative of the anticipatory nature of this action, the

1 forum selection clauses in the subject agreements and the balance of conveniences favoring
2 venue in the Southern District of New York, as discussed above, the "first-to-file" rule does
3 not apply to this action. Further, allowing these issues to be resolved in the Southern
4 District of New York will best promote the policy of judicial efficiency, which is the
5 underpinning of the broader doctrine of federal comity from which the "first-to-file" rule
6 arises. *See Kerotest Mfg. Co.*, 342 U.S. at 183; *Church of Scientology*, 611 F.2d at 750
7 ("The [federal comity] doctrine is designed to avoid placing an unnecessary burden on the
8 federal judiciary, and to avoid the embarrassment of conflicting judgments.").

9 **V. CONCLUSION**

10 Each Plaintiff in this action "irrevocably and unconditionally" agreed to (1) submit
11 to personal jurisdiction in New York, (2) waive any objection to the laying of venue there,
12 and (3) have the agreements upon which this action is based governed by New York law.
13 Plaintiffs have defaulted under their obligations under the Bridge Loan documents, and, as
14 contemplated by those agreements, must now answer for their conduct before the Southern
15 District of New York. The New York Action cannot be transferred or challenged on
16 grounds of venue or jurisdiction. Judicial efficiency and the convenience of the witnesses
17 and parties compel transfer to the Southern District of New York.

18 Under the discretionary analysis pursuant to 28 U.S.C. § 1404(a), none of the factors
19 weigh against transfer; instead, five strongly favor transfer: (1) the presence of forum
20 selection clauses selecting New York; (2) the familiarity of the Southern District of New
21 York with the state laws of New York; (3) the promotion of efficiency and avoidance of
22 conflicting judgments; (4) the convenience of the witnesses; and (5) ease of access to

23 //

24 //

25 //

26 //

27 //

28 //

1 sources of proof. Defendants respectfully request that this Court grant Defendants' motion
2 to transfer this action to the Southern District of New York.

3 Dated: November 7, 2007

JONES DAY

4
5 By: 
6 Mark D. Kemple

7 Attorneys for Defendants Greystone Servicing
8 Corporation, Inc. and Greystone CDE, LLC
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28